



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO 958 OF 2010**

**SYLVESTER ODUOR OTHWILA.....CLAIMANT**

**VS**

**PHOENIX AVIATION LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant in this case, Sylvester Oduor Othwila worked for the Respondent, Phoenix Aviation Limited for close to four years. By a Memorandum of Claim dated 18<sup>th</sup> August 2010, the Claimant sued the Respondent for unfair termination of employment. The Respondent filed a Statement of Reply on 21<sup>st</sup> January 2011 and the matter was heard between 16<sup>th</sup> July 2013 and 4<sup>th</sup> February 2014. The Claimant testified on his own behalf and the Respondent called Floyd Laval, Dan Ochieng' Ogutu and Said Ahmed Omar. Only the Respondent filed written submissions.

**The Claimant's Case**

2. The Claimant was employed by the Respondent on 1<sup>st</sup> December 2006 in the position of Spray Painter at an initial monthly salary of Kshs. 12,500 which was progressively increased to Kshs. 18,000 as at the time he left employment. On 24<sup>th</sup> July 2010, the Claimant was summarily dismissed on allegations of absenteeism from work. It was the Claimant's case that during the time he was alleged to have absented himself from work, he was on authorised sick off.

3. The Claimant's claim is as follows:

- a. 12 months' salary in compensation.....Kshs. 216,000
- b. Notice pay.....Kshs. 18,000
- c. Unlawful deductions.....Kshs. 9,000
- d. Costs plus interest
- e. Any other relief the Court may deem just to grant

**The Respondent's Case**

4. In its Statement of Reply filed on 21<sup>st</sup> January 2011, the Respondent admits having employed the Claimant on 1<sup>st</sup> December 2006. The Respondent however denies terminating the Claimant's employment without reasonable cause. The Respondent further denies that the Claimant was on authorised sick off between 13<sup>th</sup> and 29<sup>th</sup> July 2010. Rather, the Claimant's absence from work during the said period was without leave or lawful cause.

5. The Respondent goes on to state that the Claimant willfully and regularly absented himself from work. In this regard, the Respondent avers that the doctor's note exhibited in the Claimant's Memorandum of Claim as 'SOO-4' had recommended that the Claimant be taken away from an environment with extreme cold and strong paint fumes and not that he should stay away from work altogether. It is the Respondent's case that in all instances where the Claimant was authorised to be away from work on the basis of illness, an official certificate of incapacity was issued by the attending medical officer.

6. According to the Respondent, the Claimant was paid all his terminal dues less Kshs. 9,000, being prorata pay for the period the Claimant had absented himself from work without leave or lawful cause.

## **Findings and Determination**

7. The main issue for determination in this case is whether the termination of the Claimant's employment was justifiable. According to the Respondent's Statement of Reply filed on 21<sup>st</sup> January 2011, the Claimant was terminated for absenting himself from work without leave or other lawful cause specifically between 13<sup>th</sup> and 29<sup>th</sup> July 2010.

8. On 14<sup>th</sup> July 2010, a clinician at AMREF Medical Clinic issued a medical certificate to the Claimant in the following terms:

**"To Whom it may concern**

**Ref. Silvester Oduor**

***The above named has been seen by the Chest Specialist and has been advised to avoid extreme cold and also strong paint fumes as he has developed Bronchial Asthma. He needs to avoid these types of environment for 2 weeks till he sees the Chest Physician again. Your cooperation in this matter will be highly appreciated."***

9. It would appear that upon receiving this certificate, the Claimant stayed away from work for two weeks, which the Respondent construed as desertion of duty. The Respondent's witnesses presented to the Court a systematic procedure to be followed by employees seeking medical attention during working hours. The Respondent also gave the procedure for granting of sick leave to its employees, which procedure was not followed when the Claimant stayed away from work between 13<sup>th</sup> and 29<sup>th</sup> July 2010. The Respondent did not however provide any document to support its policy on sick leave.

10. On his part, the Claimant testified that he gave the medical certificate to his supervisor who allowed him to go home. He denied absconding duty.

11. From the medical reports and treatment notes filed by the Claimant, it is clear that he suffered from a prolonged chest illness dating as far back as 2008 and that this illness regularly kept him away from work. Furthermore, both the Claimant and the Respondent's witnesses testified that the work environment in which the Claimant operated required mandatory protective equipment, including a respirator.

12. The Claimant told the Court that the paint they used was very harmful and they were required to close the hangar while spraying in order to guard against polluting the environment. The Claimant and his colleagues were also given milk apparently to neutralize the harmful effect of the paint. The issue of whether the Claimant suffered from an occupational illness was however not canvassed before this Court.

13. The Claimant's termination letter dated 24<sup>th</sup> July 2010 states *inter alia*:

***“ We write to advise that your employment with the company has been terminated with immediate effect. This is as a result of your frequent absenteeism due to supposed sickness.”***

***Yours faithfully***

**S.W. BARRETTO**

**GENERAL MANAGER”**

14. From this letter, it seems to me that the reason for the termination of the Claimant's employment was frequent absenteeism due to illness. That reason differs significantly from the one advanced in the Respondent's Statement of Reply which focuses on the Claimant's absence between 13<sup>th</sup> and 29<sup>th</sup> July 2010. Moreover, if indeed the only reason for the termination of the Claimant's employment was this specific absence, then that would amount to a case of misconduct to be handled in accordance with the provisions of Section 41 of the Employment Act, 2007.

15. In the submissions filed on behalf of the Respondent, it was submitted that since the Claimant had not made a specific plea for unfair termination of employment, then the Court could not inquire into the fairness of the termination. In support of this submission, the Court was referred to a number of authorities to the effect that parties are bound by their pleadings and the Court cannot therefore grant a party what they have not pleaded.

16. This Court agrees that indeed parties must be bound by their pleadings. However in employment matters, there is a specific burden placed on the employer under Sections 43 and 45 of the Employment Act, 2007 to demonstrate that every termination of employment that is brought into question before the Court is both substantively and procedurally fair.

17. In determining whether an employer has established a valid reason for terminating the employment of an employee, the Court will examine the reason as given in the letter of termination. In the current case, the letter of termination indicates that the Claimant's employment was terminated because of frequent absenteeism due to illness.

18. In the case of ***Duncan Otieno Waga Vs Attorney General [2014] eKLR Makau J*** held that termination of employment on medical grounds may be construed as discriminatory and a contravention of fundamental rights and freedoms.

19. The Employment Act, 2007 however recognises ill health as a ground for termination of employment. Nevertheless, like in all other forms of termination of employment, due process must be followed.

20. Section 30 of the Act provides for sick leave at 7 days with full pay and 7 days on half pay. However, the Regulations under the repealed Employment Act (Cap 226) which remain in force provide for 30 days full pay and 15 days half pay. Since the provision in the regulations under Cap 226 is more advantageous to employees, employers are expected to apply them in calculating sick leave.

21. In the case of ***Kennedy Nyaguncha Omanga Vs Bob Morgan Services Limited (Industrial Court Cause No 1983 of 2011)*** this Court held that:

***“while employers are entitled to terminate employment on the ground that an employee is too ill to work, they must exercise due care and sensitivity. First, the employer must show support to the employee to recover and resume duty. Second, once the employer begins to consider termination, they must subject the employee to a specific medical examination aimed at establishing the employee’s ability to resume work in the foreseeable future. Treatment notes and sick off sheets do not qualify as medical reports for purposes of termination of employment on medical grounds. Third, the employer must give the employee specific notice of the impending***

**termination. Failure to follow this procedure even where there is overwhelming evidence of an employee's inability to work amounts to unfair termination for want of procedural fairness.**

22. In the instant case, this procedure was clearly not followed and I therefore find the termination of the Claimant's employment unfair for want of due process and award him 12 months' salary in compensation. I also award him the sum of Kshs. 9,000 being pay deducted by the Respondent for period between 13<sup>th</sup> and 29<sup>th</sup> July 2010.

23. Ultimately, I make an award in favour of the Claimant in the following terms:

a. 12 months' salary in compensation for

unfair termination.....Kshs. 216,000

b. Salary for 13<sup>th</sup> - 29<sup>th</sup> July 2010.....Kshs. 9,000

**Total.....Kshs. 225,000**

24. I further award the Claimant the costs of this case. The award amount will attract interest at court rates from the date of the award until payment in full.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF MAY 2014**

**LINNET NDOLO**

**JUDGE**

***In the Presence of:***

.....***Claimant***

.....***Respondent***